

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2969

Cir. Ct. No. 2009CF2748

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONELL HOWLETT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Kessler, Brennan and Bradley, JJ.

¶1 PER CURIAM. Ronell Howlett, *pro se*, appeals from an order of the circuit court that denied his postconviction motion without a hearing and from an order denying his motion for reconsideration. Howlett claims he was entitled to

a hearing on his claims of ineffective assistance of trial counsel. We disagree with Howlett and affirm the orders.

BACKGROUND

¶2 Howlett was convicted by a jury on three counts of first-degree sexual assault of a child who had not yet attained the age of thirteen. The victim, C.A., alleged that Howlett, a van driver for C.A.'s private school, assaulted her on three occasions by having her perform oral sex or manual masturbation on him. In May 2010, Howlett received consecutive sentences totaling fifteen years' initial confinement and six years' extended supervision.

¶3 With counsel, Howlett brought a postconviction motion in December 2011, raising six claims of ineffective assistance of trial counsel. The circuit court held a hearing on the motion, but denied the claim for relief. Howlett appealed, and this court affirmed the judgment of conviction in May 2013.

¶4 Howlett brought the underlying postconviction motion, pursuant to WIS. STAT. § 974.06 (2013-14),¹ in October 2014. He alleged trial counsel was ineffective for failing to retain the services of an expert who would evaluate the "validity" of C.A.'s statements to investigators, and for failing to introduce evidence of a sexual experience C.A. had with another student shortly before she alleged Howlett assaulted her. Howlett also claimed sufficient reason for not previously raising these issues because they were "omitted from ... a direct appeal due to the ineffectiveness of postconviction or appellate counsel."

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 The circuit court denied the motion, concluding that Howlett had not shown an expert's testimony would have changed the result of trial and that information about C.A.'s prior sexual experience would not have been permitted under the rape shield law. Thus, because Howlett had not adequately shown ineffective trial counsel, postconviction counsel could not be deemed ineffective for failing to raise the claims. The circuit court also denied Howlett's motion for reconsideration, telling him that he could not have a hearing for the purposes of a fishing expedition.

¶6 On appeal, the State points out that the circuit court denied Howlett's motion without asking for input from the State, so the State did not have a chance to raise an argument that Howlett's motion was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Although the State argues that the circuit court's determination that Howlett's motion failed on its merits was correct, it also asserts that the motion really should have been denied because of *Escalona*'s procedural bar.

DISCUSSION

¶7 To be entitled to a hearing on his motion, Howlett had to allege sufficient material facts which, if true, would entitle him to relief. See *State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. However, if the motion is conclusory, or if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may deny the motion without a hearing. See *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The sufficiency of a postconviction motion is a question of law. See *Balliette*, 336 Wis. 2d 358, ¶18.

¶8 “[A]ny claim that could have been raised on direct appeal” or in a prior postconviction motion is barred from being raised in a WIS. STAT. § 974.06 motion absent a sufficient reason for not raising it earlier. *See State v. Lo*, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also Escalona*, 185 Wis. 2d at 185. Whether a procedural bar applies is also a question of law. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶9 In some instances, ineffective assistance of postconviction counsel may constitute a “sufficient reason.” *See State ex. rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A defendant claiming postconviction counsel was ineffective for not challenging trial counsel’s effectiveness must establish that trial counsel actually was ineffective. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Demonstrating ineffectiveness requires a showing that counsel performed deficiently and that the deficiency was prejudicial. *See State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. These, too, are questions of law. *See Ziebart*, 268 Wis. 2d 468, ¶17.

¶10 The circuit court addressed the merits of the underlying claims of ineffective assistance of trial counsel and concluded the claims were baseless, so postconviction counsel was not ineffective for failing to raise those particular claims in the original postconviction motion. Thus, the circuit court denied Howlett’s motion.² While the circuit court did not expressly invoke *Escalona*, its analysis effectively applies that procedural bar: without ineffective postconviction

² It is not clear if the circuit court denied the motion because it thought Howlett did not allege sufficient facts to show ineffective trial counsel, because the record demonstrated that trial counsel was not ineffective, or a combination of both reasons.

counsel, Howlett lacks a sufficient reason for why his new claims of ineffective trial counsel were not raised in the prior postconviction motion. *See State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶¶11-12, 314 Wis. 2d 112, 758 N.W.2d 806 (describing this “circular” and “cumbersome analysis”).

¶11 We conclude, without having to reach the underlying merits of the ineffective-trial-counsel claims, that Howlett’s motion does not adequately allege ineffective assistance of postconviction counsel, so it fails to establish a sufficient reason for avoiding the *Escalona* procedural bar from the outset. *See State v. Baudhuin*, 141 Wis. 2d 642, 646, 416 N.W.2d 60 (1987) (we may affirm the circuit court on a different theory if the holding is correct).

¶12 The question for this court on review is whether Howlett’s *postconviction motion* was sufficient to entitle him to a hearing, so we review “only the allegations contained in the four corners of [the] postconviction motion,” not allegations in any brief. *See Allen*, 274 Wis. 2d 568, ¶27. Howlett’s claim of ineffective postconviction counsel, as contained in his motion, is conclusory. He merely claimed in a section title that “sufficient reason exists for not raising these issues on direct appeal” and cited to *Rothering* before launching into a discussion of the claims against trial counsel that he thinks postconviction counsel should have raised. Howlett does not, however, allege any specific facts about postconviction counsel’s performance.

¶13 Further, when a defendant alleges ineffective assistance of postconviction counsel because of a failure to raise certain material issues before the circuit court, we apply a “clearly stronger” test to compare unraised issues to those that were actually raised. *See State v. Romero-Georgana*, 2014 WI 83, ¶46, 360 Wis. 2d 522, 849 N.W.2d 668; *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir.

1985). While Howlett argues in his appellate brief that his new issues are clearly stronger than those originally raised by postconviction counsel, his postconviction motion does not so allege. See *Romero-Georgana*, 360 Wis. 2d 522, ¶¶4-6 (defendant must allege new issues are clearly stronger and must allege facts to support that claim).

¶14 Therefore, based on the contents within the four corners of Howlett's postconviction motion, we conclude that the motion is procedurally barred by *Escalona*. Howlett's motion fails to allege a sufficient reason for not raising the issues from the current motion in the prior motion.³

By the Court.—Orders affirmed.

This opinion shall not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ Howlett does not independently discuss the circuit court's order denying his motion for reconsideration, but we note that because the original denial of the postconviction motion was correct, reconsideration was not warranted and the motion was properly denied.

